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No. 06-1037

IN THE

Supreme Court of the United States

KENTUCKY RETIREMENT SYSTEMS, *et al.*,
Petitioners,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF THE NATIONAL ASSOCIATION OF COUNTIES, COUNCIL OF STATE GOVERNMENTS, NATIONAL LEAGUE OF CITIES, AND INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AS *AMICI CURIAE* SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether the use of an age classification in a disability-retirement plan automatically evidences discriminatory intent sufficient to establish a prima facie case of arbitrary age discrimination.

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INTEREST OF THE *AMICI CURIAE*

Amici are organizations whose members include state, county, and municipal governments and officials throughout the United States.[1] As public employers, *amici* have an especially strong interest in legal issues that affect their ability to manage their workforces.

Amici condemn invidious age-based discrimination against workers over the age of forty. Indeed, the States were at the forefront in banning arbitrary age-based discrimination. *See* U.S. Sec'y of Labor, *The Older American Worker: Age Discrimination in Employment* 9 (1965). *Amici* thus fully recognize the need for remedies to address intentional age discrimination.

In contrast, the issue in this case—whether the use of an age distinction to determine eligibility for disability retirement benefits is by itself sufficient to establish a prima facie case of arbitrary discrimination—raises the troubling prospect that public employers will be subject to prolonged discovery and trial even when they use benign employment policies that further the ADEA's core purpose of "promot[ing] employment of older persons." 29 U.S.C. § 621(b). The court of appeals' decision thus punishes petitioners for engaging in precisely the employment practices that the ADEA promotes.

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[1] The parties have consented to the filing of this *amicus* brief and their consent letters have been filed with the Clerk. This brief was not authored in whole or in part by counsel for a party, and no person or entity, other than *amici* and their members, has made a monetary contribution to the preparation or submission of this brief.

Because of the importance of this issue to *amici* and their members, this brief is submitted to assist the Court in its resolution of the case.

SUMMARY OF ARGUMENT

There is no evidence of discriminatory intent in Kentucky's use of age as a factor in its retirement plan. The en banc court of appeals erroneously fixated on the presence of an explicit age distinction for retirement eligibility and held that distinction sufficient to establish the "intent" element of a prima facie case of disparate treatment. Such mechanical and superficial analysis falls short of the standards set by this Court and the court of appeals itself for determining whether a prima facie case is established. The judgment below should be reversed and the case dismissed.

1. Use of an age distinction cannot establish a prima facie case of disparate treatment age discrimination unless it creates a genuine inference of discriminatory intent. Inferring that an employer has acted with an invidious motive is a process of reasoning by which a court reaches a tentative conclusion after carefully examining the relevant evidence. As this Court explained in *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978), "[a] prima facie case . . . raises an inference of discrimination only because we presume these acts, *if otherwise unexplained*, are more likely than not based on the consideration of impermissible factors." Moreover, "we are willing to presume this largely because we know *from our experience* that more often than not people do not act in a totally arbitrary manner,

without any underlying reasons, especially in a business setting." *Id.*

This Court has expressly cautioned against drawing inferences of invidious discrimination based on insufficient evidence. Although a prima facie case can "theoretically" be constituted on the basis of "very thin evidence," such low-grade evidence does not support the requisite inference as a matter of fact. *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 312 (1996).

Furnco and *O'Connor* thus militate against any mechanical conclusion that a plaintiff has met the burden of producing evidence of intent to discriminate based on age. Yet this is precisely what the en banc court did in this case. By concluding that the use of an age distinction in a retirement plan automatically evidences discriminatory intent, the court disregarded not only this Court's teachings but three decades of its own ADEA precedents. *See, e.g.*, *Laugesen v Anaconda Co.*, 510 F.2d 307 (6th Cir. 1975); *Rowan v. Lockheed Martin Energy Sys.*, 360 F.3d 544 (6th Cir. 2004).

The legislative history of the ADEA likewise confirms that mechanical inferences of intentional age discrimination are inappropriate. The House Report counsels that "[t]he case by case basis should serve as the underlying rule in the administration of the legislation. Too many different types of situations in employment occur for the strict application of general prohibitions and provisions." H.R. Rep. No. 90-805 (1967), *as reprinted in* 1967 U.S.C.C.A.N. 2213, 2220.

The House Report further specifies that the ADEA was not intended to disrupt arrangements that

already comported with the Act's purpose. It is therefore troubling that the EEOC has elected to challenge a policy that facilitates the hiring of older workers, the core purpose of the ADEA, as set forth in 29 U.S.C. § 621(b).

2. Kentucky's use of an age distinction to determine retirement eligibility is clearly not the product of discriminatory intent, nor does it result in discriminatory treatment of "similarly situated" older law enforcement officers. The plan therefore evidences no unlawful age discrimination and the EEOC failed to establish a prima facie case of disparate treatment.

Age distinctions do not violate the ADEA unless they are drawn "because of" age. This Court has stressed that the ADEA requires a causal connection between discriminatory intent and any alleged adverse treatment. This Court has held that employers do not violate the ADEA where an age-related factor, but not age itself, is the motivation for the employer's decision. *See Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993).

A line based on age, unlike one based on race, can be drawn for valid reasons related to age rather than because of age itself. For example, the Court has ruled that the Equal Protection Clause is not violated by a state law that requires law enforcement officers to retire at age 50. *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307 (1976) (per curiam). Such a law, the Court held, was rationally related to the State's interest in "protect[ing] the public by assuring physical preparedness of its uniformed police." *Id.* at 314.

Moreover, in 1996 Congress sanctioned the use of an age distinction pertaining to public safety service by amending the ADEA to permit state and local governments to make age 55 a mandatory retirement age for firefighters and law enforcement officers. 29 U.S.C. § 623(j). Far from having such a mandatory retirement age, petitioner Jefferson County gives officers the option of retiring at age 55 (or after 20 years of service), or continuing to work, as complainant Lickteig elected to do. It is at the least ironic that the County's policy of allowing officers to continue to work beyond retirement has resulted in the EEOC's claim of invidious age discrimination.

Were Kentucky to set a mandatory retirement age of 55 there could be no dispute that the same age classification Kentucky now uses to determine disability retirement would be nondiscriminatory under the ADEA. This is because an officer who is retired at 55 would not have the "opportunity" to become permanently disabled at an age when the plan offers normal retirement benefits rather than disability retirement benefits, and thus could not allege disparate treatment in comparison to a younger permanently-disabled officer.

The Kentucky retirement plan is designed to provide hazardous-duty personnel who become permanently disabled before they qualify for normal retirement with a retirement benefit that is similar to what they would have earned had they worked up to the earliest milestone of retirement eligibility. Without the use of the normal retirement age as a factor in the calculation of benefits, it would be impossible to project what an officer would have earned had she not become disabled.

Not only is the plan based on benign motives, the plan does not adversely affect older workers. The plan is a form of insurance that provides officers with two related but distinct benefits: (1) the peace-of-mind benefit that comes from the assurance of income support in the event that the officer becomes permanently disabled prior to reaching retirement age; and (2) the compensation benefit of the income support itself if and when a contingency, whether it is permanent disability or retirement, occurs. An officer who reaches normal retirement age without becoming disabled is no less insured against the contingency of permanent disability during her pre-retirement service than a homeowner with fire insurance whose house does not burn down. No one could rationally argue that either the pre-retirement officer or the homeowner would be "better off" if the contingency occurred.

Yet the EEOC's claim of intentional age discrimination says for all intents and purposes just that. It is based on the difference in compensation for post-retirement-age officers and those who become permanently disabled prior to retirement age. This simplistic notion disregards the reality that the EEOC represents a class of officers who have already enjoyed the full peace-of-mind benefits conferred by disability coverage, and are now seeking to capture a surplus of compensation benefits under the theory that the same plan that once afforded them peace-of-mind benefits is now "unequal."

The Kentucky plan is also nondiscriminatory because an officer who elects to work past age 55 is not facially excluded from any risk coverage. There is no risk for which younger officers are protected and

older officers are not. The plan does not exclude older officers from the receipt of retirement benefits in the event of a disability that prevents them from continuing to work. While post-retirement-age officers such as Lickteig are especially susceptible to age-related disabilities, the plan's normal retirement benefit assures them of coverage if and when their disability results in retirement.

The en banc court of appeals' ruling that the EEOC has made out a prima facie case of intentional age discrimination is thus irreconcilable with both this Court's cases and common sense. Because the nondiscriminatory nature of Kentucky's plan is clear, no inference of discriminatory intent can be drawn and the judgment below should be reversed.

ARGUMENT

Both the district court and a panel of the court of appeals correctly ruled that the EEOC failed to establish a prima facie case of disparate treatment age discrimination because there is no evidence of discriminatory intent in Kentucky's use of age as a factor in its retirement plan. The en banc court of appeals erred in reversing.

In its analysis, that court fixated on the presence of an age distinction for retirement eligibility and disregarded the obvious: that the purpose of the plan is to "provide[] that a worker who is disabled before reaching eligibility for normal retirement benefits has a way of receiving a retirement benefit equal to (or closer to) what he would have received had he not become disabled before reaching the normal retirement age or 20 years of service." Pet. App. 33a (Boggs,

J., dissenting). The functional effect of the court's decision is to render all explicit age distinctions in retirement plans presumptively unlawful, even where, as here, the plan clearly does not discriminate "because of . . . age." 29 U.S.C. § 623(a).

The analysis and holding of the en banc court are erroneous. That court itself has repeatedly acknowledged that "Congress did not desire that the [ADEA] be applied formalistically." *Laugesen v. Anaconda Co.*, 510 F.2d 307, 312 n.4 (6th Cir. 1975). In particular, because "the nature of age discrimination [is] quite different from discrimination based upon the classes protected by Title VII," Pet. App. 12a, "it [is] inappropriate simply to borrow and apply the [*McDonnell Douglas*] guidelines automatically" in ADEA cases. *Laugesen*, 510 F.2d at 312.

Although this fundamental error alone suffices for reversal, there is more. By forcing petitioners to go through years of discovery and possibly a trial on a patently baseless claim of intentional age discrimination, the en banc court and the EEOC are punishing Jefferson County for doing precisely what Congress intended when it enacted the ADEA—providing meaningful employment to older workers. *See* 29 U.S.C. § 621(b).

Because its analysis of the EEOC's claim of intentional age discrimination falls well short of the standard for establishing a prima facie case and defeats the primary affirmative purpose of the ADEA, the judgment of the court of appeals should be reversed.

I. THE USE OF AN AGE DISTINCTION IN A DISABILITY RETIREMENT PLAN DOES NOT AUTOMATICALLY ESTABLISH A PRIMA FACIE CASE OF INTENTIONAL AGE DISCRIMINATION.

The use of an age distinction cannot establish a prima facie case of disparate-treatment discrimination unless it creates a genuine inference of discriminatory intent. *See Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977). As this Court explained in *Furnco Constr. Corp. v. Waters*,

> A prima facie case . . . raises an inference of discrimination only because we presume these acts, *if otherwise unexplained, are more likely than not based on the consideration of impermissible factors*. And we are willing to presume this largely because we know *from our experience* that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting.

438 U.S. 567, 577 (1978) (emphasis added) (citation omitted).

Accordingly, inferring discriminatory intent is not simply a mechanical exercise. Rather, it is a process of reasoning by which a tentative conclusion is reached only after an examination of the relevant evidence—informed by what *Furnco* judiciously described as "experience." *See Black's Law Dictionary* 778 (6th ed. 1991) (inference is a "process of reasoning by which a fact or proposition sought to be established is deduced as a logical consequence from other facts, or a state of facts, already proved or admitted"); *Webster's Third New International Dic-*

tionary 1158 (1976) (inference is "the act of passing from one or more propositions, statements, or judgments considered as true to another the truth of which is believed to follow from that of the former").

Furnco thus militates against the use of per se rules to establish a prima facie case of intentional age discrimination. By concluding that the use of an age distinction in a retirement plan automatically evidences discriminatory intent, the en banc court disregarded this Court's teachings as well as that court's own long line of precedents beginning with *Laugesen*, 510 F.2d at 307 (6th Cir. 1975).[2]

As a consequence, the court also disregarded a critical distinction between race and age. While "experience" may well support an inference of discriminatory intent from the use of any racial distinction in employment, it likewise counsels that the same inference by no means automatically arises from the use of an age distinction. This is particularly true in retirement plans, where consideration of age must account for two realities: First, "all retirement plans necessarily make distinctions based on age." *United Air Lines, Inc. v. McMann*, 434 U.S. 192, 207 (1977) (White, J., concurring in the judgment). Second, advancing age does not describe an immutable quality or a discrete class, but rather "marks a stage that each of us will reach if we live out our normal span." *Massachusetts Bd. of Retire-*

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[2] A Shepard's check of *Laugesen* conducted on Nov. 1, 2007, determined that this Sixth Circuit decision has been cited 318 times since it was handed down in 1975. *Laugesen* was followed most recently for its interpretation of the ADEA's legislative history by the Sixth Circuit in *Rowan v. Lockheed Martin Energy Sys.*, 360 F.3d 544, 548 (6th Cir. 2004).

ment v. Murgia, 427 U.S. 307, 313-14 (1976) (per curiam).

Moreover, this Court has expressly cautioned against drawing inferences of invidious age discrimination based on insufficient evidence. In *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 312 (1996), the Court noted that a prima facie case could "theoretically" be constituted "on the basis of very thin evidence—for example, the replacement of a 68-year-old by a 65-year-old." The Court emphasized, however, that this inference would be unfounded because "the prima facie case requires *evidence adequate to create an inference that an employment decision was based on a[n] [illegal] discriminatory criterion . . . .*" *Id.* (internal quotations marks omitted). Thus, "[i]n the age discrimination context, such an inference cannot be drawn from the replacement of one worker with another worker insignificantly younger." *Id.* at 313.

Likewise, using age as one factor in a retirement plan is, by itself, very thin evidence that is inadequate to create an inference that the plan was based on discriminatory intent. When, as here, an age distinction is used in a benign plan that provides both disability and normal retirement benefits to all participants, it is patently insufficient to create a prima facie case of invidious age discrimination.

The legislative history confirms that mechanical inferences of intentional discrimination are incompatible with the ADEA. With the understanding that "not all age discrimination [in employment] is 'arbitrary,'" U.S. Sec'y of Labor, *The Older American Worker: Age Discrimination in Employment* 1 (1965),

the House Report counsels that "[t]he case by case basis should serve as the underlying rule in the administration of the legislation. Too many different types of situations in employment occur for the strict application of general prohibitions and provisions." H.R. Rep. No. 90-805 (1967), *as reprinted in* 1967 U.S.C.C.A.N. 2213, 2220, *quoted in Laugesen*, 510 F.2d at 312 n.4. *Accord, e.g.*, *Rowan*, 360 F.3d at 548-49 (6th Cir. 2004) ("[T]he legislative history of the [ADEA] counsels against reading the statute as forbidding any consideration of age under any circumstances.") (citing and quoting *Laugesen*); *Sahadi v. Reynolds Chemical*, 636 F.2d 1116, 1118 n. 3 (6th Cir. 1980). *See also General Dynamics Land Sys. v. Cline*, 540 U.S. 581, 586-87 (2004) ("Congress chose not to include age within discrimination forbidden by Title VII . . . being aware that there were legitimate reasons as well as invidious ones for making employment decisions on age.").

The House Report further specifies that the ADEA was not intended to disrupt arrangements that comported with the ADEA's purpose. Recognizing that certain industries already employed a disproportionately high number of older workers, the Report explained that the ADEA was not intended to "worsen a situation such as this, or to prevent an employer from achieving a reasonable age balance . . . . It is expected that the Secretary will recognize these particular situations and treat them according to their individual merits on a case by case basis." H.R. Rep. No. 90-805, *as reprinted in* 1967 U.S.C.C.A.N. at 2219-20, *quoted in Laugesen*, 510 F.2d at 312 n.4.

It is therefore disturbing that the EEOC has elected to challenge a policy that facilitates the hiring of older workers—the very raison d'etre of the Act. *See* 29 U.S.C. § 621(b). Under Kentucky's plan, a hazardous-duty officer hired at age 49 who becomes disabled at age 54 may receive a lower payout from disability retirement than an officer hired at 35 who becomes disabled at 40,[3] but the important point, lost on the court below, is that the older worker was both hired and covered under the disability-retirement plan.

Condemning this result as impermissible discrimination, particularly in a field like law enforcement that depends upon steady recruitment of new officers, would invite the problem of arbitrary age discrimination that Congress sought to remedy in the first place. As explained in the dissent below,

> [Kentucky's] very willingness to ignore ageist stereotypes and hire workers of any age actually appears to have exacerbated plaintiff's "problem." Those most "disadvantaged" are those who were oldest at the time of hiring. It would be contrary to the letter, as well as the spirit, of the ADEA to penalize the employer for the incidental ramifications of objectivity.

Pet. App. 37a (quoting *Lyon v. Ohio Ed. Assoc. & Prof'l Staff Union*, 53 F.3d 135, 140 n.6 (6th Cir. 1995)).

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[3] In this example, the 54-year-old receives one year of service credit imputed to his calculation of benefits, while the 40-year-old receives five years of service credit. *See* Pet. Br. 7a.

II. BECAUSE KENTUCKY'S USE OF AN AGE DISTINCTION IS NONDISCRIMINATORY, IT CANNOT SUSTAIN A PRIMA FACIE CASE OF AGE DISCRIMINATION.

Because "all retirement plans necessarily make distinctions based on age," *McMann*, 434 U.S. at 207 (White, J., concurring), and not all these distinctions are "because of . . . age," 29 U.S.C. § 623(a)(1), the mere use of an age distinction in a retirement plan does not evidence discriminatory intent.

In this case, Kentucky's use of an age distinction to determine retirement eligibility is clearly not the product of discriminatory intent. Furthermore, Kentucky's use of an age distinction does not result in adverse treatment for similarly situated older law enforcement officers. The plan therefore evinces no unlawful discrimination. Because the EEOC failed to proffer evidence of discriminatory intent in support of its claim of invidious age discrimination by petitioners, it failed to establish a prima facie case and this case ought to have been dismissed in its early stages.

A. A Retirement Plan May Explicitly Use Age as a Factor Without Doing So "Because of" Age.

Age distinctions do not violate the ADEA unless they are drawn "because of" age. This Court has stressed that the ADEA requires a causal connection between discriminatory intent and any alleged adverse treatment. *See Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993) ("In a disparate treatment case, liability depends on whether [age] actually motivated

the employer's decision."); *see also Smith v. City of Jackson*, 544 U.S. 228, 249 (2005) (O'Connor, J., concurring) (§ 4(a)(1) "plainly requires discriminatory intent, for to take an action against an individual '*because of* such individual's age' is to do so 'by reason of' or 'on account of' her age"). Consequently, the Court has unequivocally held that employers do not violate the ADEA where an age-related factor, but not age itself, is the motivation for the employer's decision.

In *Hazen Paper*, for example, the Court held that the employer did not engage in disparate treatment under the ADEA when it terminated a 62-year-old employee before his pension vested. The Court reasoned that "even if the motivating factor is correlated with age, as pension status typically is," there is no disparate treatment under the ADEA if the motivating factor is not age itself. *Id.* at 611.

To be sure, the explicit use of age in a retirement plan signifies that the motivation for drawing the distinction is *related* to age. But as *Hazen Paper* instructs, this is not enough to demonstrate that the distinction itself has been drawn *because of* age.

Despite this Court's guidance, the en banc court concluded that Kentucky's retirement plan "categorically excludes still-working employees over age fifty-five from a particular employment benefit *because of* their age." Pet. App. 16a. Yet, even assuming that the court was correct in finding that employees over age 55 are excluded from a material

retirement benefit,[4] the court never explained how or why the asserted differential treatment was "because of" age. Such conclusory analysis would suffice only if the existence of an age distinction is in and of itself equivalent to *the reason for* its existence—a classic tautology.

In fact, a line based on age, unlike one based on race, can be drawn for valid reasons related to age rather than because of age itself.[5] For example, in *Massachusetts Bd. of Retirement v. Murgia*, this Court held that a mandatory retirement policy for state police officers over age 50 was constitutional because it was rationally related to Massachusetts' legitimate interest in "protect[ing] the public by assuring physical preparedness of its uniformed police." 427 U.S. at 314. In so holding, the Court noted that "the primary function of the [police] is to protect persons and property and maintain law and order," and that "even [appellee's] experts concede[d] that there is a general relationship between advancing age and decreasing physical ability to respond to the demands of the job." *Id.* at 310-11 (internal quotation marks omitted).

Although *Murgia* involved an equal protection challenge rather than an ADEA challenge, the Court's refusal to treat age as a suspect class suggests that, unlike race or gender, the category of

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[4] This assumption is wrong because older workers are not adversely treated by Kentucky's plan, as explained at pp. 19-24, *infra*.

[5] *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801 (1973) ("[I]t is abundantly clear that Title VII tolerates no racial discrimination, subtle or otherwise.").

age does not invite the same presumption of invidious discrimination.[6] Equally important, *Murgia* illustrates a way in which an age distinction can be drawn not "because of" age but to advance a governmental interest related to age.

Moreover, in 1996 Congress sanctioned a virtually identical age distinction for hazardous-duty employees by amending the ADEA to permit state and local governments to set mandatory retirement at age 55 for firefighters and law enforcement officers. *See* 29 U.S.C. § 623(j). Jefferson County does not have such a mandatory retirement age; instead, officers may either retire at age 55 or after 20 years of service, or continue working, as Lickteig chose to do. Ironically, it is precisely this generosity that has resulted in the EEOC's lawsuit alleging invidious age discrimination.

The permissibility of an age distinction, apart from 29 U.S.C. § 623(j) itself, can easily be demonstrated by imagining that Kentucky sets mandatory retirement for its officers at age 55. In that case, there could be no quarrel that the same age distinction that Kentucky uses now to calculate "disability retirement" would be nondiscriminatory under the ADEA. This is because an able-bodied officer who is retired at age 55 would not have the "opportunity" to become disabled at all, and thus could not allege disparate treatment in comparison to a younger disabled

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[6] Although the Court has indicated that the ADEA prohibits a broader range of conduct than does the Equal Protection Clause, *see Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 81-86 (2000), this does not mean that age distinctions, which are "presumptively rational" under the Equal Protection Clause, *id.* at 84, are presumptively unlawful under the ADEA.

officer. Of course, "[a] benefit that is part and parcel of the employment relationship may not be doled out in a discriminatory fashion, even if the employer would be free . . . not to provide the benefit at all." *Hishon v. King & Spalding*, 467 U.S. 69, 75 (1984). The point here is that Kentucky's age distinction could unquestionably exist without incurring allegations of disparate treatment by the class of officers over age 55. There is nothing about an explicit age distinction, by itself, which evidences unlawful discrimination.

B. The Age Distinctions in Kentucky's Plan Do Not Discriminate "Because of" Age.

Kentucky's retirement plan is designed to provide an officer who becomes permanently disabled before she qualifies for normal retirement with "a retirement benefit that is roughly equivalent to what she would have earned had she worked up to the closest milestone of retirement eligibility." Pet. Br. 7; *see also* Pet. App. 33a (Boggs, J., dissenting) ("The plan simply provides that a worker who is disabled before reaching eligibility for normal retirement benefits has a way of receiving a retirement benefit equal to (or closer to) what he would have received had he not become disabled before reaching the normal retirement age or 20 years of service."). Without the use of the normal retirement age as a factor in the calculation of benefits, it would be impossible to project what an officer would have earned had she not become disabled.

Not only is Kentucky's plan based on benign motives, but older workers are not "adversely treated"

by the plan. The plan is a form of insurance that confers two related but distinct benefits for officers such as Lickteig engaged in hazardous employment: (1) the peace-of-mind benefit for officers (and their families) that comes from the assurance of income support in the event the officer becomes permanently disabled prior to reaching retirement age; and (2) the compensation benefit of the income support itself if and when a contingency (disability or retirement) is reached.

It is an axiom of insurance theory that not "only those who suffer loss and receive indemnity obtain any real benefit from insurance. . . . the promise to pay if a loss occurs may be fully as valuable as reimbursement after the loss." Albert H. Mowbray, *Insurance: Its Theory and Practice in the United States* 1 (3d ed. 1946). The value of insurance, therefore, cannot be measured only by the amount of compensation a policy promises, for if the insured-against contingency never occurs—for example, a house protected by fire insurance never burns down—then compensation is never paid; but it could scarcely be argued that the homeowner was not benefited by the insurance policy.

Nevertheless, the EEOC urges this Court to consider only the ostensible difference in compensation payouts.[7] This simplistic notion disregards the reality that the EEOC represents a class of officers who

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[7] It would be absurd to argue that a law enforcement officer does not benefit from disability coverage merely because she does not become disabled during the period of coverage, and *amici* do not understand the EEOC to be making that argument.

have already enjoyed the full peace-of-mind benefits conferred by disability coverage, and are now seeking to capture a surplus of compensation benefits under the theory that the same plan that once afforded them peace-of-mind benefits is now "unequal."

For example, a police officer who is hired at age 40 and works past normal retirement age enjoys 15 years of insurance protection against losing her livelihood due to disability. Following normal retirement age, retirement benefits are substituted for disability benefits, but this does not constitute "adverse treatment" of the class of older officers. Prior to disability, these officers continuously enjoyed the peace-of-mind benefit afforded by the very plan the EEOC now challenges. When the benefits of the plan are viewed across the time-span of employment, it is clear that "parity" cannot simply mean paying an officer like Lickteig the same amount of compensation benefits paid to pre-retirement officers. This sort of "parity" is impossible to achieve without reducing the level of insurance coverage—and thus peace-of-mind benefits—across the board.[8]

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[8] In this case, Kentucky has twice modified its retirement statute in response to this litigation, resulting in successively less robust disability coverage for its employees. *See* Pet. App. 8a-9a n.2. The 2000 version of the scheme provides that "an employee is not eligible for disability retirement benefits if the employee is 'eligible for an unreduced retirement allowance.'" *Id.* at 9a. This excludes the class of employees who qualify for normal retirement after 20 years of service. *Id.* The 2004 version of the statute calculates disability retirement benefits to be "the higher of twenty-five percent . . . of the member's monthly final rate of pay or the retirement allowance determined in the same manner as for retirement at his normal retirement date with years of service and final compensation

Put another way, the essence of the EEOC's claim of invidious age discrimination is the alleged discrepancy in monetary value of the insurance protection between older and younger officers. This contention is both reductionist and nonsensical. Because the plan calculates the disability payout for younger officers by projecting what the officer would have earned had she continued working until normal retirement age, it is meaningless for an officer over normal retirement age to claim entitlement to a benefit that is *defined* by the amount that the officer would have earned had she worked until normal retirement.

Kentucky's plan is nondiscriminatory in a second way, because an officer who chooses to work past age 55 is not facially excluded from any category of risk. In *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), the Court considered a disability insurance plan that excluded pregnancy. While pregnancy is unique to women, the Court noted that there was no evidence "that the financial benefits of the Plan worked to discriminate against any definable group or class in terms of the aggregate risk protection derived by that group or class from the program." *Id.* at 138 (internal quotation marks omitted).

In holding that the plan thus did not constitute gender-based discrimination, the Court further noted that the plan, provided to male and female workers, "covers exactly the same categories of risk, and is facially nondiscriminatory in the sense that '[t]here is

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being determined as of the date of his disability." *Id.* at 8a n.2. Because no service credits are imputed under this calculation, the benefit payout is invariably less.

no risk from which men are protected and women are not.'" *Id.* at 138. Likewise, under Kentucky's plan, there is no risk from which younger officers are protected and older officers are not.[9] The plan does not exclude older officers from being insured against disability; both young and old officers are eligible to collect a retirement pension in the event they become disabled.

Kentucky's retirement plan, like the plan in *Gilbert*, "in effect (and for all that appears), is nothing more than an insurance package, which covers some risks, but excludes others." *Id.* at 138. And in fact, far from discriminating because of age, the plan seeks to compensate officers *in proportion* to their risk of loss. Younger officers simply have more to lose. The plan aims to compensate its officers accordingly.[10] This is not "because of" age, but because of the tragedy of becoming permanently disabled before accumulating a proportionate "life's worth" of benefits. Indeed, it would be highly irrational for an officer who becomes

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[9] In fact, "disability retirement" covers only the risk of disability, while "normal retirement" provides catch-all coverage for any risks short of, or beyond, disability as defined by statute. *See* Pet. Br. 7a. An officer over age 55 need only stop working voluntarily to receive benefits.

[10] Not only is the loss objectively greater for younger workers, but as the dissent below noted, the "very reasonable benefit" created by the plan is "one that a younger worker . . . would be more likely to value more highly than a newly-hired older worker, who would be more likely to have acquired other benefits from more extensive earlier employment." Pet. App. 33a (Boggs, J., dissenting). This Court has noted that the value of the benefit to the recipient is a relevant factor in determining whether two classes are similarly situated. *See Johnson v. Robison*, 415 U.S. 361, 382-83 (1974).

disabled at age 61 due to the aging process to envy the plight of a "similarly situated" 35-year-old officer permanently disabled in the line of duty simply because the 35-year-old receives a marginally greater dollar amount of retirement benefits.

It is therefore a fundamentally false comparison to say that an officer is "similarly situated" to a younger officer with the same years of service, because this comparison disregards the reality that the plan was designed to address—that "[a]ll else being equal, the non-disabled [younger employee] of course has more years to work and live than does [the older employee]." Pet. App. 31a (Boggs, J., dissenting). *See Hazen Paper*, 507 U.S. at 611 ("On average, an older employee has had more years in the work force than a younger employee, and thus may well have accumulated more years of service with a particular employer.").

Finally, any possibility that Kentucky's use of an age distinction is arbitrary is foreclosed by the recognition by Congress that age 55 is a rational line to differentiate the risks related to law enforcement service. *See* 29 U.S.C. § 623(j); *see also Murgia*, 427 U.S. at 310-11 (recognizing the "general relationship between advancing age and decreasing physical ability to respond to the demands of the job"). While an officer over age 55 may be unusually susceptible to age-related risks, Kentucky need not pay for the extra cost of insuring those risks. Just as "pregnancy-related disabilities constitute an additional risk, unique to women . . . the failure to compensate them for this risk"—in this case, by not paying an identical dollar amount of retirement benefits to every disabled officer—"does not destroy the presumed parity of the benefits . . . which results from

the facially evenhanded inclusion of risks." *Gilbert*, 429 U.S. at 139.

Thus, age does not "actually motivate[] the employer's decision" in this case. *Hazen Paper*, 507 U.S. at 610. Rather, as is clear from the nature of the plan, petitioners' motivation is to provide adequate and appropriate coverage to the entire hazardous-duty work force, including law enforcement officers starting their careers.

The legal conclusion urged by the EEOC—that petitioners' retirement plan invidiously discriminates because of age—is irreconcilable with this Court's guidance that "a prima facie case . . . raises an inference of discrimination only because we presume these acts, *if otherwise unexplained,* are more likely than not based on the consideration of impermissible factors." *Furnco*, 438 U.S. at 577 (emphasis added). Here, the nondiscriminatory nature of the plan explains itself. Because the plan is neither based on discriminatory motives nor results in differential treatment for older workers, no inference of intentional discrimination can reasonably be drawn.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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